Selinsing Mining Sdn Bhd v Selinsing Gold Mine Manager Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22 NCVC-1204–10 OF 2012
AHMAD NASFY J
12 OCTOBER 2016

Civil Procedure — Action — Consolidation of actions — Defendants applied to consolidate two suits pursuant to O 4 of the Rules of Court 2012 — Whether court had jurisdiction to transfer case to another court of coordinate jurisdiction — Whether court could give direction as to future conduct — Whether defendants' application for consolidation complied with O 4 of the Rules of Court 2012 — Courts of Judicature Act 1964 — Rules of Court 2012 O 4

This was an application ('encl 228') by the defendants pursuant to O 4 of the Rules of Court 2012 ('the ROC') for the prayers that the present suit ('Shah Alam Suit') be transferred and consolidated with the suit in Kuantan High Court ('the Kuantan Suit'); and that the Shah Alam Suit to be heard immediately after the Kuantan Suit had been disposed off. The Kuantan Suit was filed by the second and third defendants against Summer Empire Sdn Bhd and Kesit Pty Ltd claiming for the return of 100% of the shares in the plaintiff. The plaintiff opposed encl 228 on the ground that the application seems to mask the ulterior intention of ensuring that the Shah Alam Suit assumes subsidiary importance and that the Kuantan Suit would be heard and disposed off first. The issues for determination were with regards to the power and jurisdiction of a court of coordinate jurisdiction to transfer a case from one court to the other; and whether the defendants' application for consolidation had complied with O 4 r 1 of the ROC.

Held, dismissing encl 228:

(1) Paragraph 12 of the Schedule to the Courts of Judicature Act 1964 ('the CJA') clearly revealed that in the case of a transfer to or from two High Court of concurrent jurisdiction, one High Court can only effect transfer of proceedings and cannot give any direction as to the future conduct thereof. In the present case, the defendants sought an order that this High Court give directions to a fellow High Court to the future conduct thereof, namely, first to consolidate Shah Alam Suit with the Kuantan Suit; and secondly to direct that the Shah Alam Suit be heard after the Kuantan Suit. The orders sought by the defendants were beyond the scope of the powers exercisable by the court (see paras 27–28).

(2) The defendants could not seek to read para 12 of the Schedule to the CJA

together with O 4 of the ROC to lend support its argument that both provisions confers power and jurisdiction to the High Court to make the order as applied in encl 228. That argument was erroneous as the provisions of the ROC 2012 could not be used as a basis to confer power when clearly the power was not available and that the ROC was merely a governing procedure and not the source of substantive power (see para 28).

(3) With regards to the issue of consolidation, the causes of action in Shah Alam Suit and the Kuantan Suit were completely different. There was also no rationale that the time and costs would be achieved in consolidating the two suits as the Shah Alam Suit was already at a far advanced stage and could proceed independently of the Kuantan Suit. The parties in Shah Alam Suit were different from the parties in the Kuantan Suit. There was no risk of any inconsistent judgment. Further, the application, if granted would prejudice the plaintiff, Kesit Pty Ltd and one Peter Steven Kestel to the benefit of the defendants. Based on the above findings, the defendants had not met the requirements of O 4 of the ROC for an order of consolidation of the suit (see paras 33–34).

[Bahasa Malaysia summary

Permohonan ini ('lampiran 228') oleh defendan-defendan menurut A 4 Kaedah-Kaedah Mahkamah 2012 ('KM') untuk permohonan-permohonan agar guaman ini ('Guaman Shah Alam') dipindahkan dan digabungkan dengan guaman di Mahkamah Tinggi Kuantan ('Guaman Kuantan'); dan bahawa Guaman Shah Alam didengar dengan segera selepas Guaman Kuantan telah selesai. Guaman Kuantan telah difailkan oleh defendan-defendan kedua dan ketiga terhadap Summer Empire Sdn Bhd dan Kesit Pty Ltd dengan menuntut untuk pengembalian 100% syer dalam plaintif. Plaintif membangkang lampiran 228 itu atas alasan bahawa permohonan itu seperti menyembunyikan niat lain bagi memastikan Guaman Shah Alam memperoleh kepentingan subsidiari dan agar Guaman Kuantan didengar dan diselesaikan dahulu. Isu-isu untuk ditentukan adalah berkaitan kuasa dan bidang kuasa mahkamah yang mempunyai bidang kuasa sama untuk memindahkan kes dari satu mahkamah ke satu mahkamah lain; dan sama ada permohonan defendan-defendan untuk penggabungan telah mematuhi A 4 k 1 KM tersebut.

Diputuskan, menolak lampiran 228:

(1) Perenggan 12 dalam Jadual kepada Akta Mahkamah Kehakiman 1964 ('AMK') jelas menunjukkan bahawa dalam kes pemindahan ke atau dari dua Mahkamah Tinggi yang mempunyai bidang kuasa sama, salah satu Mahkamah Tinggi hanya boleh melakukan pemindahan prosiding dan tidak boleh memberi arahan berhubung pelaksanaan masa hadapan. Dalam kes ini, defendan-defendan memohon satu perintah agar

Mahkamah Tinggi ini memberi arahan kepada Mahkamah Tinggi lain berhubung pelaksanaan masa hadapan itu, iaitu, pertama untuk menggabungkan Guaman Shah Alam dan Guaman Kuantan; dan keduanya untuk mengarahkan agar Guaman Shah Alam didengar selepas Guaman Kuantan. Perintah-perintah tersebut dipohon oleh defendan-defendan yang melampaui skop kuasa yang boleh dilaksanakan oleh mahkamah itu (lihat perenggan 27–28).

(2) Defendan-defendan tidak boleh dipohon untuk membaca perenggan 12 Jadual kepada AMK tersebut bersama dengan A 4 KM untuk memberi sokongan kepada hujahnya bahawa kedua-dua peruntukan memberi kuasa dan bidang kuasa kepada Mahkamah Tinggi untuk membuat perintah sepertimana yang terpakai dalam lampiran 228. Hujah tersebut adalah salah kerana peruntukan-peruntukan KM 2012 tidak boleh digunakan sebagai asas untuk memberikan kuasa apabila ianya jelas bahawa kuasa itu tidak tersedia dan bahawa KM hanya mengawal prosedur dan bukan sumber kuasa substantif (lihat perenggan 28).

(3) Berhubung isu penggabungan, kausa-kausa tindakan dalam Guaman Shah Alam dan Guaman Kuantan berbeza langsung. Tiada rasioanal juga bahawa masa dan kos dapat dikurangkan dalam menggabungkan dua guaman itu kerana Guaman Shah Alam telahpun berada pada peringkat hampir selesai dan boleh diteruskan secara berasingan tanpa Guaman Kuantan. Pihak-pihak dalam Guaman Shah Alam berbeza daripada pihak-pihak dalam Guaman Kuantan. Tiada risiko tentang apa-apa penghakiman yang tidak konsisten. Selanjutnya, permohonan itu, jika diberikan akan memprejudiskan plaintif, Kesit Pty Ltd dan Peter Steven Kestel yang menguntungkan defendan-defendan. Berdasarkan penemuan di atas, defendan-defendan tidak memenuhi keperluan A 4 KM untuk perintah penggabungan guaman (lihat perenggan 33–34).]

Notes

For cases on consolidation of actions, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 122–135.

Cases referred to

Applied Creative Technology Sdn Bhd v Mohamad Hashim bin Ali & Ors [2012] MLJU 1302, HC (refd)

Del E Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd [1973] 1 MLJ 31b (refd)

Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor [2016] 3 MLJ 553; [2016] 4 CLJ 641, HC (refd)

Kumpulan Emas Bhd v Dato' Lim Teng Lew & Anor [2004] 2 MLJ 614, HC (refd)

Lian Mong Yee v Abdul Rashid bin Maidin & Ors [2001] 4 MLJ 38, CA (refd)

Mayban Trustee Bhd v Amalan Tepat Sdn Bhd & Anor [2006] 3 MLJ 82, HC (refd)
Ng Joo Soon @ Nga Ju Soon v Devechem Holdings (M) Sdn Bhd and Ors [2010] MLJU 1854; [2010] 1 LNS 1677, HC (refd)
Ops Suria (EM) Sdn Bhd v Ayuda Engineering Services Enterprise Sdn Bhd [2012] 9 MLJ 159, HC (refd)
TNB Engineering and Consultancy Sdn Bhd & Anor v Boccard Oil & Gas Sdn Bhd [2008] 2 MLJ 43, CA (refd)
Tan Hoo Eng & Ors v Lim Keck Eng & Ors [2014] 9 CLJ 992, HC (refd)
United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and other applications [2003] 1 MLJ 465, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3, Schedule, para 12
Rules of Court 2012 O 4, O 4 r 1, 1(1)(a), O 57 r 1

K Selvakumaran (Nur Izzaida bt Zamani with him) (Azwan & Nadzim) for the plaintiff.
Mohd Arief Emran bin Arifin (Yeoh Yao Huang with him) (Wong & Partners) for the defendants.

Ahmad Nasfy J:

INTRODUCTION

[1] On 6 September 2016 I dismissed the defendants' application in encl 228. Dissatisfied the defendants have now appealed. Below are my grounds in dismissing the application.

Enclosure 228

[2] This application is filed by the defendants. According to the defendants it is filed pursuant to O 4 of the Rules of Court 2012. The following prayers were sought:

(a) that the present suit be transferred and consolidated with the suit in Kuantan High Court; and

(b) that this suit be heard immediately after the suit in the Kuantan High Court has been disposed off.

[3] The relevant cause papers filed that are relevant in respect of this application are as follows:

(a) amended bundle of pleadings dated 6 February 2015;

(b) notice of application dated 13 July 2016;

A (c) 'affidavit sokongan' affirmed by Robert Frederick Baldock on 11 July 2016 ('AIS');

(d) 'affidavit jawapan (1)' affirmed by Cedric David Joseph Williamson on 22 July 2016 ('AIR(P)'); and

B (e) 'affidavit jawapan defendan-defendan (1)' affirmed by Robert Frederick Baldock on 2 August 2016 ('AIR (D)').

BACKGROUND FACTS

C **[4]** At this juncture it is pertinent to refer to certain facts as far as they are relevant to the disposal of the application herein. In October 2012, Selinsing Mining Sdn Bhd ('Selinsing') commenced the present writ action in Shah Alam High Court Civil Suit No 22 NCVC-1204–10 of 2012 (the 'Shah Alam Suit') against:

D a) Selinsing Gold Mine Manager Sdn Bhd ('SGMM');

b) Able Return Sdn Bhd ('ARSB'); and

c) Monument Mining Ltd ('MML').

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[5] Some years later and specifically on 30 January 2015, ARSB and MML commenced an action in the Kuantan High Court ('the Kuantan Suit') against: (a) Summer Empire Sdn Bhb; and (b) Kesit Pty Ltd, claiming for the return of 100% of the shares in Selinsing Mining from the two defendants therein.

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[6] The defendants through encl 228 sought the prayers alluded to earlier. The application was strongly resisted by the plaintiff. The thrust of the plaintiff's objection was that the application seems to mask the ulterior intention of ensuring that the action herein assumes subsidiary importance and that the Kuantan Suit will be heard and disposed off first. In other words the application was made to achieve that objective under the 'guise of consolidation'.

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H *The applicant's/defendant's submission*

[7] The defendant's counsel submitted that it is trite law that two or more pending causes/matters may be consolidated to be tried at the same time or once immediately after another or one matter to be stayed until after the determination of any other causes/matter in the following circumstances:

I (a) where some common question of law or fact arises in both of all of them;

(b) where the right to relief claimed therein are in respect of or arise out of the some transaction or series of transaction; or

(c) for some other reason it is desirable to make such order. A

[8] Kuantan Suit was filed by MML (the third defendant herein) and ARSB (the second defendant herein) against Kesit Pty Ltd ('Kesit') and Peter Steven Kastel ('Peter'). The fact which has been pleaded in the said Kuantan Suit are relevant for the purpose of the defendants' present application as follows: B

(a) at all material times, Selinsing (the plaintiff in this present suit), was the sublease holder of two mining certificate described as MC1/113 and MC1/124 respectively;

(b) MML had agreed to purchase 51% of Selinsing Mining interests of the sublease on MC1/113 and 100% of Selinsing Mining interests of the sublease on MC1/124 vide Selinsing Purchase Sale and Option Agreement dated 30 June 2006 ('Agreement 30 June 2006') (exh RFB4); C D

(c) further, vide 'Able/Selinsing Purchase Agreement' dated 31 May 2007 ('sale and purchase 31 May 2007'), MML had acquired the remaining balance of the 49% interest on MC1/113 (exh RFB5). It is not a dispute fact that the purchase price and/or consideration for the purpose of purchasing Selinsing's interest on the mining leases has been fully paid; and E

(d) it is provided in the sale and purchase 31 May 2007 that Summer Empire Sdn Bhd ('SESB') (which had now been dissolved) was appointed as the trustee to hold the entire 100% of the issued shares of the Selinsing, for the beneficial interest of the plaintiff, pending outcome of certain events based on the terms referred in the said sale and purchase 31 May 2007 as stated in cl 1.1(i), addendum H, addendum I, cl 2.1 and cl 2.2. F G

[9] For the purpose of the Kuantan Suit, according the defendants, only the sublease on MC1/124 is relevant as until today the sublease remains to be registered under Selinsing. The sublease on MC1/113 had been forfeited by the Pahang State Authority on 27 June 2007. Thereafter, a new lease had been issued directly to ARSB on 5 August 2008. H

[10] Selinsing had then made an application to Perbadanan Kemajuan Negeri Pahang ('PKNP'), requesting for the assignment and/or transfer and/or replacement of the MC1/124 sublease to ARSB. However on 28 October 2009, PKNP had rejected Selinsing's application and had only agreed to the appointment of the ARSB as the mining contractor on MC1/124 (exh RFB10). I

[11] The defendants further contend that the failure of Selinsing to obtain the consent of PKNP for the assignment and/or transfer of MC1/124 sublease to ARSB gives rise to SESB's obligation to transfer the entire 100% issued shares of Selinsing to ARSB, as clearly stipulated in cl 2.2 of the sale and purchase agreement 31 May 2007, SESB at that material time (which now has been dissolved) was under the control of Peter, who was the director of SESB together with Zaidi Harun and Jimee Shah.

[12] Evidently, 1,999.998 shares of Selinsing were transferred to Kesit on 14 December 2011. Peter is one of the directors of Kesit whilst the shareholders of Kesit are also Peter and his wife. At the material time Peter was also the director of SESB and Selinsing.

[13] In the Kuantan Suit, the plaintiff's claim was that the transfer of Selinsing shares to Kesit by SESB was wrongful and illegal. The defendants further canvassed that the following facts are of prime importance:

(a) at all material times, Selinsing is the sublease of MC1/113 and MC1/124, through which Selinsing held 100% interests for sublease of two gold mines located at Mukim Ulu Jelai, Sungai Kermai, Daerah Kuala Lipis, Pahang;

(b) through 'Selinsing Purchase Sale and Option Agreement' dated 30 June 2006 ('agreement 30 June 2006') (exh RFB4) and through 'Able/Selinsing Purchase Agreement' dated 31 May 2007 (sale and purchase 31 May 2007) (exh RFB5), MML had acquired the entire right of Selinsing over the said sublease with valuable considerations;

(c) in June 2007, ARSB and MML had acquired the entire rights of Selinsing over the said subleases, with valuable considerations;

(d) in June 2007, ARSB and MML had paid in full the valuable considerations and/or purchase price for acquiring mining rights of MC1/113 and MC1/124, as agreed by the parties;

(e) Selinsing is claiming for its purported rights to the 5% of the participating interests/shares on the production and profit obtained from the gold mine joint venture, purportedly pursuant to the joint venture agreement dated 2 July 2007 ('JVA 2007') (exh RFB6) and the purchase price allocation agreement dated 21 November 2007 ('PPAA 2007') (exh RFB7); and

(f) the only distinct facts in this present suit as compared to the Kuantan Suit are the validity and enforceability of the said 'JVA 2007' and 'PPAA 2007'. The defendants' defence is that the said JVA 2007 and PPAA 2007 are not valid, not binding on the parties and without any lawful consideration.

[14] The defendants, in amplification, submitted that there are common question of fact and law in both Kuantan Suit and this present suit, which amongst others relate to the legality of the transfer of the Selinsing share and the trial judge in determining this present suit will have to also determine the issues, among others, firstly, as to whether Selinsing has the locus to file the present suit; and secondly whether the Selinsing shares are beneficially and rightfully belong to ARSB. Thus the issues must be decided as a preliminary issue before the issue of the validity of the JVA 2007 and PPAA 2007 should be determined.

[15] In sum up the defendants' counsel submitted that the defendants have satisfied the requirement under the first limb of O 4 r 1(1)(a) of the Rules of Court 2012 ('the ROC') which requires 'some common question of law or facts arises in both or all of them' for a matter to be consolidated. Hence, it is proper for this present suit to be consolidated with the said Kuantan Suit at the Kuantan High Court. It was further stated that the relief claimed by the parties in both the Kuantan Suit and this present suit arose out of the same transaction, the series of the sale and purchase agreement 31 May 2007 and 30 June 2007 in relation to the subleases on MC1/124 and MC1/113. In other word, the facts pleaded in Kuantan Suit and this present suit are interconnected and are cross-actions wherein the second and third defendants herein are the plaintiff in the Kuantan Suit. In support the defendants had referred to the cases of *Applied Creative Technology Sdn Bhd v Mohamad Hashim bin Ali & Ors* [2012] MLJU 1302, *Kumpulan Emas Bhd v Dato' Lim Teng Lew & Anor* [2004] 2 MLJ 614.

The respondent's/plaintiff's submission

[16] The plaintiff in resisting the application argued that the defendants are in fact seeking an order for consolidation of the present suit with another pending suit in the Kuantan High Court, which indirectly purports to direct the Kuantan High Court on the future conduct of their action upon its transfer, in that the present action should only be disposed of after the Kuantan High Court action is disposed of. It was canvassed that such an application is misconceived.

[17] The plaintiff's counsel submitted that through this application, the defendants sought an order under O 4 r 1 of the ROC that:

(a) this suit be consolidated with the Kuantan Suit and be contained as a single action; and

(b) that this suit be heard and disposed of immediately, after the Kuantan Suit is tried or disposed of in full.

[18] It was contended that the defendants do not move this court under O 57 r 1 of the ROC 2012 for a transfer simpliciter but they come to court seeking for an order which purports to direct that the Kuantan High Court refrain from disposing the Shah Alam Suit until the Kuantan Suit is disposed of under the guise of 'consolidation'. From the outset, the plaintiff's counsel submits that, the application, if allowed, would constitute an abuse of process as they seek an ultra vires order. Therefore this application must fail and be dismissed *in limine*.

[19] The plaintiff states that the power to order a transfer of a case from one High Court to another is embodied in para 12 of the Schedule to the Courts of Judicature Act 1964 ('the CJA') reads:

> 12 Transfer of Proceedings
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> Power to transfer any proceeding to any other Court or to or from any subordinate Court, and in the case of transfer to or from a subordinate Court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of Court.

[20] By reading para 12 of the Schedule, it clearly reveals that in the case of a transfer to or from two High Courts of concurrent jurisdiction, one High Court can only effect a transfer of proceedings. It cannot give any directions as to the future conduct thereof.

[21] As regards to an application for consolidation, the plaintiff asserts that the principles are well settled. It is primarily for convenience, ie to save time and costs. In this context, the plaintiff contends that following matters are relevant considerations on an application for consolidation:

(a) whether there is some question of law or fact bearing sufficient importance to render it desirable that the actions he disposed of at the same time; and

(b) whether two inconsistent judgments will come into existence if consolidation is not ordered.

[22] Counsel for the plaintiff further submitted that the cause of action in the Shah Alam Suit and Kuantan Suit are completely different, and there are no common questions of fact or law involved. Further, no savings in time and costs will be achieved in consolidating the two matters as the Shah Alam Suit is already at a far more advanced stage and can proceed independently of the Kuantan Suit, there are no cross-actions as the defendants herein are plaintiff in the Kuantan Suit, the parties are different and there is no risk of any inconsistent judgment.

Issues

[23] Form the above, in my judgment there are essentially two issues to be considered. They are:

(i) jurisdictional issue; and

(ii) whether the defendants' application for consolidation had complied O 4 r 1 of the ROC.

Finding of the court

[24] Having fully and carefully considered the defendants' application in encl 228 and issues raised in the written submission, I now come to the following conclusions.

Issue (i) — Jurisdiction issue

[25] In order to resolve this issue in my judgment, the primary task would be to understand the power and jurisdiction of a court of coordinate jurisdiction to transfer a case from one court to the other. In respect of the High Courts the power, as correctly pointed out by the plaintiff's counsel, para 12 of the Schedule to the CJA. A proper dissection of the said provision clearly reveals the following:

(a) that a High Court has the power to:

(i) transfer any proceeding to any other high court. It follows;

(ii) transfer to or from any subordinate court. In the exercise of this power to transfer to or from any subordinate court the court the High Court may give any direction as to the further conduct of the proceeding.

See the Federal Court's decision in *United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and other applications* [2003] 1 MLJ 465 where the Haidar FCJ held that 'looking at s 25 of the CJA and the meaning of 'court', the words 'any other court' should in its proper context mean a court of co-ordinate jurisdiction. This is further amplified by the power given to transfer any proceedings to or from a subordinate court and to give any directions to the further conduct thereof provided that this power shall be exercised in such manner as may be prescribed by any rules of court. I find no such power for the Court of Appeal to do so. 'Subordinate court' under s 3 of the CJA means 'any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court';

(b) that based on the drafting of the said provision, as between the High Courts the power of transfer can only be exercised in way of 'to transfer

to' the other High Court. In short what this means is that an applicant who wishes to transfer a case must make the application in the High Court where the case is pending and that the application cannot be made to the other High Court for a case to be transferred to it. For example where an applicant wishes to make an application for a case that is pending in Shah Alam to be transferred to the Johor Bharu High Court, that application has to made in the Shah Alam High Court and not at the Johor Bharu High Court — see *Lian Mong Yee v Abdul Rashid bin Maidin & Ors* [2001] 4 MLJ 38 where the Court of Appeal held at p 48 that 'Paragraph 12 of the Courts of Judicature Act 1964 empowers a High Court to transfer a suit before it to another court, but it does not confer jurisdiction in the opposite direction';

(c) in contrast, as regards to the power of transfer in respect of proceedings the power is wider in that the power is exercisable to either 'transfer to' or 'from'the subordinate court;

(d) that only in respect of the transfer involving a proceeding in the subordinate court can the High Court gives direction on the further conduct of the proceeding; and

(e) that following the proviso in the said paragraph this power of transfer is exercisable in the manner prescribed in the procedural rules. In the absence of the rules this power is exercisable nevertheless. In the case of *Ops Suria (EM) Sdn Bhd v Ayuda Engineering Services Enterprise Sdn Bhd* [2012] 9 MLJ 159 it was argued that since no procedural rules were prescribed by the rules the power of transfer cannot be exercisable. Ravinthran JC having referred to the conflict of cases on the effect of absence of prescribed rules on the exercise of power of transfer came to the conclusion that 'the power conferred by para 12 of the Schedule can be exercised although there are no special rules in existence for the exercise of it'.

[26] It must be stressed at this point that the power of transfer cannot be equated with the power to order consolidation of the suits. It is in this context that one may appreciate the plaintiff's argument as canvassed above; that way in which encl 228 is couched showed that the application for 'transfer' is lumped together with consolidation. Thus by seeking a further order that this present suit to be heard only after the said Kuantan Suit has been disposed off, the application lacked bona fide and according to the plaintiff 'ultra vires' the power stated in para 12 above.

[27] In my judgment and at the risk of repetition para 12 of the Schedule to the CJA clearly revealed that in the case of a transfer to or from two High Court of concurrent jurisdiction, one High Court can only effect a transfer of proceedings. It cannot give any direction as to the future conduct thereof.

[28] In this case the defendants sought an order that this High Court give directions to a fellow High Court as to the future conduct thereof, namely, first to consolidate this case with the Kuantan Suit; and secondly to direct that this case be heard after the Kuantan Suit. From what I have stated above the orders sought by the defendants are beyond the scope of the powers exercisable by this court. In follows therefore that if the court were to accede to the application the court will be acting 'ultra vires' its power. Hence on this basis the application is misconceived and must stand dismissed. Still on this point I wish to further stated that the defendant cannot, in my view, seek to read para 12 together with O 4 of the ROC to lend support its argument that both provisions confers power and jurisdiction to the High Court to make the order as applied in encl 228. That argument, in my considered view, is erroneous as the provisions of the ROC 2012 cannot be used as a basis to confer power when clearly the power is not available and that the ROC is merely a governing procedure and not the source of substantive power — see *Hap Seng Plantations (River Estates) Sdn Bhd v Excess Interpoint Sdn Bhd & Anor* [2016] 3 MLJ 553; [2016] 4 CLJ 641.

[29] Before concluding on this issue I should like to say that the defendants in making the application appear not to appreciate peculiar circumstances of this case which is that the cases are still pending in two different courts namely the Shah Alam Court and the Kuantan Court. In the circumstances it is prudent in my view for the applicant to have couched the prayers more properly first to seek the transfer from the one court to the other and the separately to pray for a consequential order to have the cases consolidated.

[30] Having said the above I must also state that I have considered the merits of the application and having looked at the facts of the case as far as they are relevant to the application herein I came to the conclusion that the defendants have not satisfied the requirements that justifiy the exercise of the power to transfer. I am not convinced that Kuantan is the better forum or forum convenience. See *Tan Hoo Eng & Ors v Lim Keck Eng & Ors* [2014] 9 CLJ 992.

Issue (ii)

[31] For completeness I shall now address the issue of consolidation.

[32] It is settled law that before an order for consolidation can be granted the following matters has to be satisfied:

(a) that there is some common question of law or fact bearing sufficient importance to render it desirable that the actions be disposed of at the same time — *Kumpulan Emas Bhd v Dato' Lim Teng Lew & Anor* [2004] 2 MLJ 614;

A (b) the rights to relief claimed arise from the same transaction or series of transaction — see *Mayban Trustee Bhd v Amalan Tepat Sdn Bhd & Anor* [2006] 3 MLJ 82; *TNB Engineering and Consultancy Sdn Bhd & Anor v Boccard Oil & Gas Sdn Bhd* [2008] 2 MLJ 43; and

B (c) the desirability to save time and to avoid two inconsistent judgments coming into existence if consolidation is not ordered — see *Del E Webb International Hotel Co v Hotel Merlin Penang Sdn Bhd* [1973] 1 MLJ 31b;

C **[33]** Having scrutinised the affidavits and the written submission of both parties I now come to the conclusion as follows:

a) the causes of action in Shah Alam and the Kuantan Suit are completely different whereby there are no common questions of fact or law involved;

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b) there is no rationale that the time and costs will be achieved in consolidating the two matters as Shah Alam Suit is already at a far advanced stage and can proceed independently of the Kuantan Suit (see *Ng Joo Soon @ Nga Ju Soon v Devechem Holdings (M) Sdn Bhd and Ors* [2010] MLJU 1854; [2010] 1 LNS 1677);

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c) the parties in Shah Alam Suit are different from the parties to the Kuantan Suit, as it involves Kesit Pty Ltd and Peter Steven Kestel (who are not parties in the present suit);

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d) there is no risk of any inconsistent judgment;

e) the application, if granted would prejudice Selinsing Mining, Kesit Pty Ltd, and Peter Steven Kestel to the benefit of the defendants. The live issue of the Shah Alam Suit is whether MML and ARSB are liable to pay the plaintiff large amounts of money under the JVA. If their application is allowed, the Shah Alam Suit would be put on hold pending the determination of the Kuantan Suit under which ARSB and MML have sought the return of the Selinsing Mining shares. In the event the defendants succeed and obtain the return of the Selinsing Mining shares, they can then use their control over Selinsing Mining (by virtue of their share ownership) to discontinue the Shah Alam Suit.

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[34] In short, it is my considered judgment that the defendants have not met the requirements of O 4 of the ROC to enable me to exercise jurisdiction to order consolidation of the suit.

I

CONCLUSION

[35] Based on the reason adumbrated above, I conclude that the application filed by the defendants is without merits and stands dismissed and I so order.

Enclosure 228 dismissed.

Reported by Dzulqarnain Ab Fatar